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Nos. 81-1920, 81-1921, 81-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION , *et al.*,
Respondents.

NORTHERN NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORP, *et al.*,
Respondents.

CITIES SERVICE GAS CO., *et al.*,
Petitioners,

v.

MOBIL OIL CORP., et al,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

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May 1982

QUESTIONS PRESENTED

1. Whether this Court should grant petitions which seek review and reversal of judgments upholding respondents' quasi-contractual right to recover the reasonable value of commingled helium out of interpleaded funds, in view of its five denials of like petitions in this and a related action.

2. Whether the Court of Appeals denied petitioners due process of law in holding, under the doctrine of the law of the case rather than stare decisis, that the workback method of valuing commingled helium is applicable in these actions.

3. Whether the Court of Appeals denied petitioners due process of law in holding that payments to petitioners by the United States for commingled helium as a part of the prices paid for crude helium, were money had and received to respondents' use and were the minimum of respondents' recovery in these actions.

4. Whether the Court of Appeals denied petitioners due process of law in holding these cases under advisement, after consolidated *en banc* argument with a related case, until the issue of the value of commingled helium was finally determined in the related case, and then removing these cases from *en banc* status and setting them for further briefing and oral argument before a panel of the Court.

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BRIEF IN OPPOSITION FOR RESPONDENT GULF OIL CORPORATION, A LESSEE-PRODUCER

STATEMENT

Nature of the Actions

These are six consolidated class actions in the nature of interpleader brought under 28 U.S.C. § 1335 in the District Court for the District of Kansas by petitioners (the Helex Group) against two groups of defendants, one the respondent lessee-producers, the other the respondent landowners, to determine adverse claims to interpleaded funds, which are the proceeds received by petitioners from the sale of 23.4 million Mcf of crude helium to the United States during the Helium Conservation Program, which was in effect from 1962-1973, pursuant to the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. § 167 et seq. The United States intervened and aligned itself with petitioners.

It has previously been decided in these actions that respondent lessee-producers are entitled to recover the reasonable well head value of commingled helium out of the interpleaded funds. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). (J.A. A134) The judgment of which review is now sought relates only to the method of determining value, the minimum of such value and the allowance of pre-judgment interest.

The Five Prior Petitions

The petitions now before this Court are the sixth, seventh and eighth which have been filed by petitioners or their allies, Phillips Petroleum Company and the United States seeking review and reversal of judgments holding that respondents are entitled to recover the reasonable value of commingled helium in quasi-contract and deciding the method of determining rea-

sonable value. The five prior petitions have been denied in three cases which have come to be known for convenient reference as *Grounds I*, *Ashland I* and *Ashland II*, with these cases being known as *Grounds II*. These cases may be summarized as follows.

Grounds I

The first case, in which this Court denied the first two petitions, which were by the present petitioners, was *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). (J.A. A134) In it the Court held that "the Helex companies must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners". *Id* at 707. (J.A. A137). This is required by "reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole". *Id.* at 723. (J.A. A168). In so holding the Court rejected the claim of petitioners to the entirety of the interpleaded funds which was based on the argument that "there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates". *Id.* at 721. (J.A. A164). But the Court rejected this argument, saying "We are not persuaded. The protection of the Natural Gas Act is for consumers, not the Helex companies". *Id.* Later it said "In our opinion private contract law and the principles applicable thereto are not controlling". *Id.* at 722. (J.A. A166).

This decision ended the liability phase of these cases which had been divided from the beginning into a liability phase to be tried first and a damage phase to be tried later, if necessary. The Court of Appeals

accordingly remanded the cases to the District Court for trial of the damage phase, which is these *Grounds II* cases.

Ashland I

The second case, in which this Court denied the third and fourth petitions, one by the United States, the other by Phillips, was *Ashland Oil, Inc. v. Phillips Petroleum Co. v. United States*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921, 968 (1977). (J.A. A429). This was a diversity action in the District Court for the Northern District of Oklahoma by Ashland against Phillips, in which the United States intervened and aligned itself with Phillips, to recover the value of commingled helium which Phillips had separated from gas supplied by Ashland and sold to the United States as crude helium under circumstances identical with these cases.

This action was pending when the decision on liability in *Grounds I* became final. When this occurred, Ashland's action went to trial before these *Grounds II* cases. The Oklahoma District Court held that commingled helium had a well head value which ranged from $11.76 to $16.98 per Mcf. *Ashland I*, 364 F. Supp. 6 at 10. (J.A. A477). Phillips and the United States appealed.

While these appeals were pending, the Kansas District Court proceeded to the trial of these *Grounds II* cases. He held that commingled helium had a well head value which escalated from 60¢ per Mcf in 1961 to 70¢ per Mcf in 1972. Grounds II, 393 F. Supp. 949 at 984. (J.A. A105). The lessee-producers and the landowners appealed.

Faced with this vast gulf in valuations by the two district courts, the Court of Appeals withdrew a prior

opinion in *Ashland I*, granted rehearing *en banc*, granted hearing *en banc* of these *Grounds II* cases, and consolidated the two cases for argument and submission.

Following the consolidated *en banc* hearing, the Court of Appeals held these *Grounds II* cases under advisement, and handed down its opinion in *Ashland I*. It made three important basic holdings:

It held that Ashland was entitled to recover the reasonable value of commingled helium in quasi-contract and that such recovery was not barred by the price provisions of the gas purchase contracts which had been filed as FPC gas rate schedules. *Ashland I*, 554 F.2d 381 at 388. (J.A. A445).

It held that federal, and not state, law was to be applied not only in construing the federal statutes involved but also to all substantive issues, under the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), because of the deep involvement of the United States in the Helium Conservation Program and this litigation. *Id.* at 389-391. (J.A. A448-A453).

It held that the District Court was correct in holding that there were no comparable sales by which the value of commingled helium could be determined and that work-back (value or proceeds-less-costs) was therefore properly applied, *Id.* at 386-388. (J.A. A440-A445); but it reversed and remanded for additional evidence on the proper starting point and four cost items. *Id.* at 388-389. (J.A. A445-A448).

Ashland II

The third case, in which this Court denied the fifth petition, which was by Phillips, was *Ashland Oil, Inc. v.*

Phillips Petroleum Co. and United States, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). (J.A. A385). This was a *per curiam* opinion in which the Court of Appeals affirmed a valuation of $3 per Mcf but remanded for the inclusion of pre-judgment interest.

The District Court arrived at the $3 value not only upon an application of work-back but also upon a consideration of the equitable nature of Ashland's quasi-contractual action and the inclusion of the $2 payment for commingled helium in the prices which the United States paid Phillips for crude helium. *Ashland II*, 463 F. Supp. 619 at 625. (J.A. A390 at A426-7).

Phillips' petition did not question the method of determining value but again urged, as had its petition in *Ashland I*, that the price provisions of the FPC gas rate schedules defeated recovery of reasonable value in quasi-contract. Phillips' Pet. for Cert. in No. 79-1250, October Term, 1979.

Grounds II

When *Ashland II* became final upon this Court's denial of certiorari, the Court of Appeals *en banc* upon its own motion ordered that these *Grounds II* cases be removed from abated status, that their *en banc* status be terminated and granted leave for further briefing and a second oral argument before a three judge panel. (J.A. A330). Following this second oral argument, it handed down its decision which the Helex companies now petition this Court to review and reverse. *Northern Natural Gas Co. v. Grounds*, 666 F.2d 1279 (10th Cir. 1981). (J.A. A1).

It held that work-back is as applicable here as in *Ashland I* and *II* because the record here does not show any comparable sales which were not already found

non-comparable in *Ashland I* and because the opinion of an expert witness upon which the District Court and petitioners relied was not a sufficient basis for rejecting work-back. It therefore held that the District Court erred in rejecting it. *Id.* at 1283-1285. (J.A. A10-A15).

It held that a $2 per Mcf payment for commingled helium which petitioners had received from the United States was money had and received to respondents use and was the minimum respondents were entitled to recover out of the interpleaded funds. *Id.* at 1285-1289. (J.A. A15-A24). This payment had been included in the build-up of the prices paid petitioners for crude helium, which was based on the costs the government would have incurred had it built the plants plus interest on investment, taxes, insurance and profit. One of the cost items was called "helium payment" which was a payment of $2 per Mcf of commingled helium delivered at the plant inlet. It increased to $2.35 per Mcf when related to the volume of the crude helium delivered at the plant outlets for which the government was paying. It was as applicable at the well head as the plant inlet, because all costs between these two points were covered by another item called "shrinkage". *Id.*

Finally, it held that the District Court did not err in awarding pre-judgment interest. *Id.* at 1289-1290. (J.A. A24-A26).

It remanded the case for further proceedings in the light of the opinion.

SUMMARY OF ARGUMENT

The Court of Appeals did not deny petitioners due process of law in holding for the fourth time that respondents are entitled to recover the reasonable value of commingled helium. All of petitioners arguments to defeat such recovery are based on the controlling effect of state law and the price provisions of the FPC gas rate schedules. These arguments were rejected in *Grounds I*, *Ashland I* and *Ashland II*, which held that the right of recovery is quasi-contractual, is controlled by federal law and is not barred by either payment of FPC service rates or the price provisions of FPC gas rate schedules. This Court has denied five petitions which sought review and reversal of these decisions.

The Court of Appeals did not deny petitioners due process when it held upon appeal, and without the question having been raised in the District Court, that the $2 "helium payment" was money had and received by petitioners to the use of respondents. This is a pure question of law based on the undisputed fact that this payment was for commingled helium and was received by the petitioners as a part of the prices paid by the United States for crude helium. No amount of evidence could erase this fact, and petitioners' argument that this holding is contrary to state contract law again ignores that these are quasi-contractual actions governed by federal law — and that under federal law restitution must be made of benefits received in excess of lawful service rates.

The Court of Appeals did not deny petitioners due process in holding, as a matter of the law of the case rather than stare decisis, that work-back is as applicable here as in *Ashland* in determining the value of commingled helium, since it had heard petitioners'

arguments to the contrary at both the first and supplemental arguments of these cases.

Since an *en banc* hearing is not a matter of private right, but of sound judicial administration, the Court of Appeals did not deny petitioners due process of law when it returned these cases to three-judge status for a second hearing after the *en banc* court had decided the proper method of valuing commingled helium in *Ashland I.*

ARGUMENT

Right of Recovery and Due Process

The preceding review of the course of these proceedings shows that this Court has denied five petitions seeking reversal of decisions that respondents are entitled to recover the reasonable well head value of commingled helium in quasi-contract. Nevertheless, the present petitions again seek such reversal and urge that recovery is limited by the price provisions of the gas purchase contracts filed as FPC gas rate schedules.

The reasons now advanced in these sixth, seventh and eighth petitions are a revised edition of the reasons which petitioners originally advanced in *Grounds I.* They are identical with the reasons which the United States and Phillips advanced in *Ashland I* and *II.*

Petitioners originally argued in *Grounds I* that there could be no recovery of reasonable value in quasi-contract because "there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates". *Grounds I,* 441 F.2d 404 at 721. (J.A. A164).

When the Court rejected this argument and held that FPC service rates do not cover commingled helium,

petitioners, Phillips and the United States changed the focus of their argument from payment of FPC service rates to the price provisions of the gas purchase contracts filed as FPC gas rate schedules. This shift was inspired by this Court's holding in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974) that there was not federal district court federal question jurisdiction under 28 U.S.C. § 1331(a) of Texaco's suit against Phillips to recover the reasonable value of commingled helium. From this Court's statement that the "source [of the action] is state law and not federal law," *Id.* at 129, it was argued in briefs and at the consolidated *en banc* hearing of these cases and *Ashland I* that state substantive law applies under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and that there can be no recovery in quasi-contract because of the universal rule of state law that an express contract precludes an implied contract.

The Court of Appeals rejected this argument in *Ashland I.* It pointed out that *Texaco* "was concerned only with federal question jurisdiction under 28 U.S.C. § 1331(a), and not whether state or federal law controls", and that "federal law was applied" in *Grounds I. Ashland I*, 554 F.2d 381 at 389. (J.A. A449). It then held that federal law under *Clearfield*, and not local law under *Erie*, controlled all substantive issues, because of the deep interest and involvement of the United States in the Helium Conservation Program and this ensuing litigation. *Id.* at 389-391. (J.A. A449-A453).

Concerning Phillips' claim that the price provisions of the FPC gas rate schedules barred recovery in quasi-contract it said,

> Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds*, "In our opinion private contract law and the principles applicable thereto are not controlling."

Id. at 388. (J.A. A445).

It is thus the established law of these cases that neither local law, the payment of FPC service rates nor the price provisions of FPC gas rate schedules bar or limit respondents' recovery of the reasonable value of commingled helium in quasi-contract. Petitioners' arguments that they are thereby deprived of contractual property rights without due process of law have previously been rejected and have no merit.

The $2 Helium Payment and Due Process

The arguments that petitioners direct against the holding that the $2 helium payment is money had and received to respondents' use are that this issue was first raised on appeal and that the holding is contrary to state rules of contract law. These arguments again ignore that these are quasi-contract actions which are controlled by federal law — one rule of which is that restitution must be made of benefits received in excess of lawful service rates and that an appropriate action to

this end is the modern successor of the common law action of *indebitatus assumpsit* for money had and received. This is the holding of the two decisions of this Court upon which the Court of Appeals based its decision. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935).

The application of this rule in these cases is invoked by the undisputed facts concerning the build-up of the prices which the United States paid petitioners for crude helium, which the Court below reviews in its opinion. *Grounds II*, 666 F.2d 1279 at 1286-88. (J.A. A15-A24). In very brief summary these facts are that one of the cost items in the build-up was a "helium payment" of $2 per Mcf of helium contained in the gas delivered at the plant inlet, because this is what the United States would have paid had it built the plant. This was increased to $2.35 per Mcf when related to the volumes of crude helium at the plant outlets for which the United States was paying. And it was applicable at the well head because another item called "shrinkage" covered all costs between the well head and the plant inlet.

The holding that this payment was money had and received to the use of respondents can have come as no surprise to petitioners. Its importance was first noted in *Grounds I* when the Court of Appeals said at the very beginning of its consideration of the question of respondents' right of recovery that this "recognition of helium value in the volumes of gas processed in the plants results in a price substantially higher than the FPC service rate". *Grounds I*, 441 F.2d 704 at 717. (J.A. A157). It was twice noted by the District Court in *Ashland II* as one of the factors considered in determining commingled helium value. *Ashland II*, 463 F. Supp. 619

at 626,635. (J.A. A407, A426). And in their supplemental brief in these *Grounds II* cases petitioners discuss its legal effect, but their discussion is dismissed with the comment "These statements, in our view, do not address the issue". *Grounds II*, 666 F.2d 1279 at 1288. (J.A. A22).

Despite this rejection of the arguments they have already made on this issue, petitioners now assert a denial of due process because the issue was not raised in the trial court. There might be a semblance of merit in this contention if, as petitioners assert, these were contract actions governed by state law. But they are quasi-contract actions governed by federal law. And no amount of evidence that the Helex companies might produce could erase the fact that the payment was for commingled helium and that it was received by petitioners as a part of the price for crude helium. On this fact alone depends petitioners' obligation to make restitution of this benefit received in violation of the federal law of rate regulation which the Court applied in *Grounds I*.

Work-back and Due Process

When this Court's denial of certiorari in *Ashland II* placed the stamp of unreviewable finality on the holding that work-back was the proper method of determining commingled helium value in that case, the Court of Appeals on its own motion set these *Grounds II* cases for further briefing and a second oral argument.

At that hearing petitioners and the United States had the opportunity to show that work-back was not applicable here, even though it was in *Ashland*. That they took advantage of this opportunity is shown by the opinion below. It summarizes and finds insufficient the testi-

mony of the expert which was their principal reliance for distinguishing these cases from *Ashland. Grounds II*, 666 F.2d 1279 at 1284. (J.A. A12). It also reviews and finds insufficient to the same end two sales of commingled helium and 41 interstate sales and 25 intrastate sales of helium-bearing natural gas which petitioners proffered as "a wealth of comparable sales in addition to those before this court in *Ashland*." *Id.* at 1284-5. (J.A. A12-A14). The Court of Appeals therefore held that these cases are not distinguishable from *Ashland* and that work-back is as applicable here as it was there.

Whether this holding is based on the doctrine of the law of the case or *stare decisis* does not raise a question of constitutional magnitude. Even though petitioners were not parties to *Ashland*, they have been accorded two hearings of their arguments concerning the proper method of valuation, one before and one after the decisions in *Ashland*. At the second hearing, their arguments were directed expressly to the point that *Ashland* was distinguishable and was not a controlling precedent. The arguments were found wanting. Due process does not entitle them to still a third hearing on this question.

En Banc Hearing and Due Process

Nor did the Court of Appeals, as is urged by Northern and Cities Service, but not by Panhandle, deprive petitioners of due process rights when it removed these cases from *en banc* status before the second argument and assigned the second argument to a three-judge panel. An *en banc* hearing, and even more a second *en banc* hearing, is not a matter of private right but of sound judicial administration. Petitioners have made, and can make, no suggestion that it is not sound judicial

administration to return a case to three-judge status for decision of any remaining issues, after the *en banc* court has decided the basic issue of the proper method of valuation and thus bridged the vast gap in valuations between the two District Courts, which led to convening the *en banc* court in the first place.

Moreover, petitioners have, in effect and for practical purposes, already enjoyed a second *en banc* hearing. They filed their petitions for rehearing and suggestions for rehearing *en banc* as single documents. The Court ordered responses by these respondents, which was done. All of the active judges of the Circuit and of the three-judge panel were thereby obligated to examine and consider not only the suggestions but also the petitions and responses. Having done so, no single judge asked for a vote on the suggestions.

CONCLUSION

The cumulative result of petitioners' arguments is that their due process rights will not have been satisfied unless they are granted plenary review by this Court or a fourth hearing by the Court of Appeals, which must be *en banc,* at which it must overrule four decisions holding that respondent lessee-producers are entitled to recover the reasonable value of commingled helium in quasi-contract.

Their arguments are frivolous.

Their petitions should be denied.

Respectfully submitted,

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